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Congress of the United States

Washington, DC 20515

March 23, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MM Docket Nos.
98-204

96-16 ✓

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The Honorable William E. Kennard
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Dear Chairman Kennard:

We write to comment on the Commission's Notice of Proposed Rule Making in the matter of its Broadcast and Cable Equal Employment Opportunity (EEO) Rules and Policies.

It is our belief that the proposed rules are inconsistent with the D.C. Circuit's decision in *Lutheran Church - Missouri Synod v. FCC*, which struck down the Commission's previous EEO program as violative of the Equal Protection Clause of the U.S. Constitution. As you are well aware, the Court ruled that the Commission's policies did not meet the strict scrutiny standard of the Supreme Court's *Adarand* decision, which extended to federal programs the requirement that racial classifications be narrowly tailored to serve a compelling state interest. The Court found it "impossible to conclude that the government's interest [in diversity of programming], no matter how articulated, is a compelling one."

If the Commission disagreed with the court's ruling -- which a majority of the Commissioners obviously did -- then the Commission should have appealed it. Instead, the FCC has modified its rules to exempt those with the determination to challenge the old regulations (religious broadcasters) and otherwise has made only cosmetic changes to the EEO program in an attempt to circumvent the Court's ruling. We do not find this approach acceptable.

Under the proposed rule, the Commission will continue to require firms to record and report the racial, ethnic, and gender characteristics of job applicants, employees, and those who are promoted. However, the Commission will discontinue the collection of data for those hired, acknowledging that this would run afoul of the Court's ruling and the Constitution. Of course, this is a superficial distinction. If the FCC has data on who applied for positions and who is currently employed, then it will have a fair idea who was hired.

For those employers wondering how they are to ascertain the race, ethnicity, and gender of job applicants, the Commission offers helpful suggestions for identifying females, Blacks, Hispanics, Native Americans, Alaskan Natives, Asians, and Pacific Islanders (the established classifications) in its "Instructions for Completion of FCC Form 395-B Broadcast Station Annual Employment Report." Under instruction 9, "Minority Group Identification," the FCC counsels that determinations may be made "visually, from post-employment records or in accordance with what the person is regarded as belonging in the community." This is Orwellian. No government agency has any business ordering prospective employers to guess the ethnicity of job applicants based on physical or any other characteristics. Such practices invite -- no, *require* -- ethnic

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stereotyping. This is simply unacceptable.

Again, the proposed rule would require that broadcasters and cable firms continue to keep statistical records "totaling the race, ethnic origin, and gender of all applicants generated by each recruiting source according to vacancy." The Commission claims that these records will not be used to evaluate minority hiring; however, the rule goes on to note that "without such records, the Commission is unable to ascertain whether an entity is making sincere efforts to recruit women and minorities into its applicant pools." So, the Commission will not be evaluating hiring, but it will be evaluating sincerity. Is this really within the mission of the FCC? We suggest that it is not.

The proposed rule further states that broadcast and cable entities will be required "to analyze their EEO programs on an ongoing basis" for compliance with FCC rules, and that "entities would be sanctioned for deficiencies in their recruitment and record-keeping efforts and not for the results of their hiring decisions." So, firms are to believe that they will be punished for not adequately recruiting minorities, for not adequately documenting their minority employment, and for not doing adequate self-analysis of their EEO efforts, but that the FCC has no interest in whether they actually hire adequate numbers of members of minority groups. With all due respect, this stretches credulity.

At an absolute minimum, the Commission must discontinue the collection of racial, gender, and ethnic employment data. The mandatory collection of such data sends the unambiguous message that the FCC is monitoring the minority hiring of each company it regulates. There is the implied threat that those whose figures do not meet the goals of the Commission will suffer unspecified consequences, despite unconvincing assurances to the contrary.

The proposed rule raises additional questions in our minds. Why did the Commission decide to cover cable entities in addition to commercial broadcasters, but not public broadcasters? Indeed, why were the revised regulations not applied to *all* telecommunications firms, inasmuch as all firms are currently covered by rules similar to those struck down by the Court? The Commission had asserted in court that its broadcast EEO regulations were designed solely to foster diverse programming content. If anything, the rationale for applying similar EEO rules to non-broadcast entities is even weaker.

The Notice solicits comment on granting administrative relief to stations with small staffs or in small markets. We believe that relief should be granted to small businesses by eliminating the EEO reporting and record-keeping requirements for *all* entities.

Regarding Paperwork Reduction Act analysis, the Commission requests comment on, among other things, whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information has practical utility, and ways to minimize the burden of collection of information on respondents. We conclude that the information is not necessary for the legitimate functions of the Commission, that it therefore does not have practical utility, and that the administrative burden should be reduced

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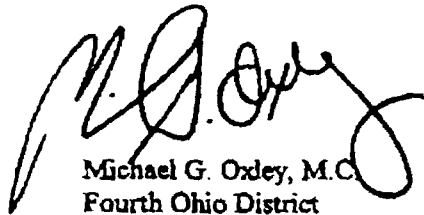
by not collecting it.

Under the heading "Federal Rules that Overlap, Duplicate, or Conflict with the Proposed Rules," the Notice states that "[t]he proposed rules do not overlap, duplicate or conflict with any other rules." This is a curious assertion, given that the Equal Employment Opportunity Commission is charged with enforcing the nation's laws prohibiting employment discrimination. The FCC's EEO program substantially replicates the work of the EEOC, in essence creating a redundant regulatory agency within the Commission.

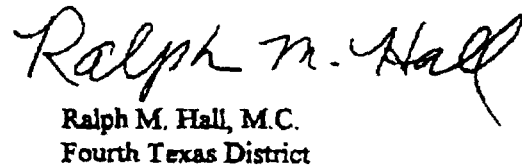
In conclusion, the Commission's proposed Equal Employment Opportunity rules are confusing, contradictory, unwarranted, and unconstitutional. The effort to revise them in response to the ruling of the D.C. Circuit is inadequate and substantially beneath the quality of work we have come to expect of the FCC under your capable leadership. We recommend that the Commission begin from scratch and make a more serious effort to follow the guidance provided by the Court.

Thank you for your consideration of these views.

Yours truly,



Michael G. Oxley, M.C.
Fourth Ohio District



Ralph M. Hall, M.C.
Fourth Texas District

cc: Commissioner Susan Ness
Commissioner Michael Powell
Commissioner Harold Furchtgott-Roth
Commissioner Gloria Tristani